IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG

REPUBLIC OF SOUTH AFRICA

Case No. 6675/09

In the matter between:

SHOPRITE CHECKERS (PTY) LIMITED Applicant

and

EVERFRESH MARKET VIRGINIA (PTY) LIMITED
Registration No. 2002/017631/07
Previously known as WILD BREAK 166 (PTY) LIMITED Respondent

REASONS FOR JUDGMENT

KOEN J

Introduction

[1] The applicant, the registered owner of certain immovable property described as Portions, 506, 507, 508, 509, 510 and 542 all of Erf 3193 Durban North and commonly known as the Virginia Shopping Centre ('the property') applied for an order on motion against the respondent in the following terms :

> '(a) Evicting respondent from the property known as Postal – 25 Hinton Place, Virginia shopping Centre, DURBAN NORTH;
>
> (b) Further and/or alternative relief;
>
> (c) That respondent be ordered to pay the costs of this application."

On 25 May 2010 I granted an order in the above terms. These are my reasons for that order.

[2] Before dealing with the merits of the matter it is necessary to correct the citation of the respondent. In the founding papers, the respondent was not described but simply referred to as '*Wild Break 166 (Pty) Limite"*. The answering affidavit indicated, and this is now common cause, that the respondent was previously known by that name, but that its correct description is 'Everfresh Market Virginia (Pty) Limited Registration No. 2002/017631/07'. All processes issued against the respondent should therefore be issued under its current correct name.

Background

[3] When the applicant purchased the property on auction, it purchased it subject to all the lease agreements in force over the property on the date of the auction sale. The respondent leased portion of the property for its Everfresh store, described as Postal – 25 Hinton Place, Virginia Shopping Centre, Durban North ('the leased premises') in terms of a written lease concluded on 15 July 2003.

[4] The salient provisions of the lease agreement relating to the respondent's occupation of the leased premises include the following:

(a) the lease commenced on 1 April 2004 for five (5) years terminating on 31 March 2009;

(b) clause 3 provides :

> 'Provided that the Lessee has faithfully and timeously fulfilled and performed all its obligations under and in terms of this Lease, the Lessee shall have the right to renew same for a further period of Four years and Eleven months commencing on 1st April 2009, such renewal to be upon the same

terms and conditions as in this Lease contained save that there shall be no further right of renewal, and save that the rentals for the renewal period shall be agreed upon between the Lessor and the Lessee at the time. The said right of renewal is subject to the Lessee giving written notice to the Lessor of its intention so to renew, which notice shall reach the Lessor not less than six (6) calendar months prior to the date of termination of this lease. In the event of no such notice being received but the Parties failing to reach agreement in regard to the rentals for the renewal period at least three (3) calendar months prior to the date of termination of this Lease, then in either event this right of renewal shall be null and void.'

[5] On 14 July 2008 the respondent addressed a letter to the applicant in which it purported to exercise the right to renew the lease agreement for a further period of four (4) years and eleven (11) months from 1 April 2009 to 28 February 2014, in terms of clause 3 of the lease agreement. This letter read:

'In terms of clause 3 of the lease over "25 Hinton Place", dated 15 July 2003, we hereby exercise our option to renew the lease for a further period of 4 years and 11 months from 1 April 2009 to 28 February 2014.

We propose that reasonable escalation would be in line with the existing lease at 10,5% pa.

Accordingly we propose a commencing rental at R93 6000 per month.'

[6] On 3 September 2008 the applicant replied as follows:

'We refer to the above matter and your letter dated 14 July 2008 purporting to exercise a right of renewal in terms of the lease agreement dated 15 July 2003.

> We wish to inform you that, according to our interpretation of the lease agreement and understanding of the law, clause 3 does not constitute a legally binding and enforceable right of renewal which is capable of being exercised by Wild Break 166 (Pty) Ltd. We are therefore of the opinion that your letter dated 14 July 2008 does not impose any contractual obligation to renew and/or have the effect of extending the lease agreement beyond the term referred to in clause 1 thereof. The lease agreement will accordingly terminate after on 31 March 2009 by which date you are required to vacate the lease premises.
>
> Apart from the fact that you are not legally entitled to renew the lease, we are in any event desirous to redevelop the Virginia Shopping Centre that will also impact upon the lease premises. We are thus unable to negotiate the extension of the lease agreement beyond the current termination date (31 March 2009). We may however reconsider our position once the redevelopment of the shopping centre has been completed.'

[7] The respondent remained in occupation. In the founding affidavit the applicant alleges that it is prejudiced by the respondent's illegal occupation of the premises in that it cannot pursue the intended redevelopment of the property.

The Legal Issue

[8] The respondent accepts that clause 3 does not contain an option which by its unilateral acceptance, would give rise to a binding and enforceable lease for the renewal period. That concession clearly is correct in law, as one of the essentialia for a valid lease, namely that the amount of the rental has to be specified, be fixed or definitely ascertainable, has not been satisfied – see

Cooper Landlord and Tenant 2nd ed. at page 347. The reasoning underlying that concession is, however, instructive and relevant to a consideration of the further issues in this matter and requires brief mentioning.

[9] Our Courts have consistently held that an option to renew a lease upon terms to be agreed, is invalid and unenforceable. In Biloden Properties (Pty) Ltd v Wilson 1946 NPD 736, the full court of the Natal Provincial Division, with reference to an option to renew upon terms to be arranged, commented:

> 'The parties are then in the position of negotiators, but neither is obliged to agree to anything. It may be that some duty to act in good faith is cast upon the lessor, but the exact nature and extent of that duty, if it exists at all, are impossible to define.'

Likewise in Hattingh v van Rensburg 1964 (1) SA 578 (T) Trollip J, at pages 582 H to 583 A, quoted with approval from Williston on Contracts to the effect that:

> '… yet if an essential element is reserved for the future agreement of both parties, the promise can give rise to no legal obligation until such future agreement. Since either party by the very terms of the promise may refuse to agree to anything to which the other party will agree, it is impossible for the law to affix any obligation to such promise.'

In South African Reserve Bank v Photocraft (Pty) Ltd 1969 (1) SA 610 (C), a case dealing with an option to renew a lease 'at a rental to be mutually agreed upon, under the same terms and conditions as herein contained, provided the lessee notifies the lessor in writing of his intention to exercise such option on

or before 31 January 1969', Steyn J following Hattingh v van Rensburg (supra) quoted with approval from Scheepers v Vermeulen at page 613 G – H where Horwitz J held :

> '… ek is van mening dat 'n verbintenis om te onderhandel te vaag is om af te dwing weens die absolute diskressie waarmee die gebonde persoon beklee is.'

In Roode v Morkel 1976 (4) SA 989 (A) it was held that if the right to renew in the lease was to be interpreted as an option to renew on terms to be agreed, it would be unenforceable (at 993 A – B). An 'agreement to agree' creates no enforceable contract – see Shell SA (Pty) Ltd v Corbitt & Another 1986 (4) SA 523 (C) at 526 D – E and Wasmuth v Jacobs 1987 (3) SA 629 (SWA) at 633 I – 634 C where it was held that an option at a rental to be mutually agreed upon did not cast an obligation on the appellant in that case to engage in any negotiations in order to arrive at a rental whether such rental was to be fair and reasonable or not.

Any uncertainty there may be was removed by the judgment in Letaba Sawmills (Edms) Bpk v Majovi (Edms) Bpk 1993 (1) SA 768 (A) at 773 I – J where it was held that:

> 'Dit is so omdat 'n ooreenkoms om te onderhandel en op die huurgeld ooreen te kom, onafdwingbaar is en dus die nietigheid van die opsie tot gevolg sou gehad het.'

See also Mervis Brothers v Interior Acoustics & Another 1999 (3) SA 607 (W) at 613 B and Body Corporate of Fish Eagle v Group Twelve Investments (Pty) Ltd 2003 (5) SA 414 (W) at 422 A – C.

[10] Implicit in the respondent's concession is also that the clause does not imply that a reasonable rental would be payable during the renewal period. In any event, such a term even if it could be implied, would not be of any assistance either. Notwithstanding the persuasive statements by Nicholas JA in Genac Properties Jhb (Pty) Ltd v NBC Administrators CC 1992 (1) SA 566 (A) at 579 H – I, it seems clear that South African law does not recognise that the obligation to pay a reasonable rental gives rise to sufficient certainty to result in a valid and enforceable agreement of lease – see Trook t/a Trook's Tea Room v Shaik & Another 1983 (3) SA 935 (NPD) at 937 B – C and 939 A – B; Amavuba (Pty) Ltd v Pro Nobis Landgoed (Edms) Bpk & Others 1984 (3) SA 760 (N) at 765 H.

[11] The present position must also be distinguished from clauses that provide for negotiation and, failing agreement, for a dispute resolving mechanism involving a third party – see Southern Port Developments (Pty) Ltd v Transnet Ltd 2005 (2) SA 202 (SCA) at 205 G – H. It was held in that case, at 211 E – F, that such provisions elevate the agreement in which they appear to have legal force and distinguish it from an agreement to agree, because of the dispute resolution mechanism to which the parties have bound themselves and the final and binding nature of for example the arbitrator's

decision regarding the amount of the rental, thus rendering the rental amount certain and ascertainable.

[12] The clause is also not a right of first refusal as in Soteriou v Retcor Poyntons (Pty) Ltd 1985 (2) SA 922 (A) where Nicholas JA held that the clause, although referring to a rental that may be mutually agreed upon, properly constructed was a right of first refusal. Consequently, the lessor was under an obligation to offer the lessee a new lease plainly by making an offer with rental and other terms sufficiently certain to be capable of being turned into a contract by acceptance (Botha JA in a dissenting judgment came to a different conclusion.)

[13] The legal issues raised by the respondent are as follows :

(a) clause 3 of the lease provides the respondent with a right to renew the lease;

(b) the mechanism provided for the determination of the rental is that it shall be agreed between the lessor and the lessee;

(c) in the event of the parties failing to reach agreement at least three (3) calendar months prior to the date of termination, then the right of renewal shall be null and void;

(d) it is not open to the applicant to frustrate the right to renew by refusing to negotiate;

(e) the parties are obliged to negotiate in good faith. If they thereafter fail to reach agreement in good faith, the right of renewal falls away;

(f) until this has happened, the applicant is not entitled to evict the respondent.

The onus

[14] Applicant's ownership of the leased premises being admitted, it is for the respondent to demonstrate a legal basis upon which it is entitled to remain in occupation of the leased premises, or then at least to ward off the eviction until a later date. Although specific argument was not addressed on this aspect, it appears that the onus will be on the respondent – see OK Bazaar (1929) Ltd v Cash In CC 1994 (2) SA C 347 (A) at 361 G – H. Nothing much however turns on this point.

The Respondent's argument in brief

[15] Although accepting that the judgment is distinguishable on the facts, the respondent places reliance on an unreported judgment of McLaren, J. in Shoprite Checkers Ltd v Manual Fernandes t/a Chicago Take-away under case no. 6347/99 delivered on 31 March 2000. Clause 4.3 in that case provided that if the tenant desired to renew the lease he was to notify the landlord in writing by prepaid registered mail of such intention not later than 6 months prior to the expiration of the termination date and that:

'upon receipt of the tenant notification as referred to above the landlord undertakes within thirty (30) days from date thereof to notify the tenant of the terms and conditions which will be applicable during the renewal period and in the event of the parties hereto being unable to reach consensus within a period of thirty (30) days from date of receipt of such notice, the right of renewal shall be deemed to lapse and

be of no further force and/or effect whatsoever and he tenant duly undertakes the vacate the premises …'

The lessee sent a notice of its intention to renew the lease to which the lessor deliberately failed to respond. McLaren J held that there was considerable force in the argument, based on his interpretation of clause 4, that the consequence of the lessor's failure to respond to that letter was that it must be taken to have approved the lease.

In interpreting clause 4 he started with the general principle of interpretation that a contract must be construed so as to give it business efficacy – General Chemical Corporation (Coastal) Ltd v Interskei (Pty) Ltd & Another 1984 (3) SA 240 D at 248 H, although recognising that it is a rule of construction which must be applied with circumspection. The learned judge found that the clause was not merely an 'invitation to negotiate' for a number of reasons set out in detail from page 34 onwards and including that:

(a) to do so would render the clause meaningless and redundant;

(b) such an interpretation was inconsistent with the wording seeking to confer a 'right of renewing the lease;

(c) the clause prescribed two requirements before the right of renewal could be exercised, neither of which could conceivably be a relevant consideration if the effect of the clause was simply that the parties were at liberty to decide whether to negotiate with each other;

(d) the clause imposed a number of clearly defined obligations on the respondent; and

(e) The clause created a time frame within which the process for the renewal had to commence and be completed, this process being commenced by the receipt by the applicant of the respondent's notice in terms of which he exercises his right to renew the lease.

[16] The clause in the present case contains no process as in the Shoprite case. Admittedly, written notice of an intention to renew from the lessee is required, but absent the communication of an intention to renew (this being an expression of the intention of the respondent), there would be no possibility of a renewal in any event. Such notice is a logical requirement and not a significant procedural step.

[17] If timeous notification was received, the lease could be renewed upon the same terms and conditions as the initial term of four (4) years and eleven (11) months, provided the 'rentals for the renewal period' are agreed 'at the time'. If the parties fail to reach agreement 'at the time' ie at the time of the notice of renewal, in regard to the rental amounts to be applied during the renewal period 'at least three (3) calendar months prior to the date of termination of the lease, ' the right of renewal would be null and void.

[18] In the present instance there was no obligation, like in the Shoprite case for the lessor within thirty (30) days to notify the lessee of the terms and conditions which would be applicable, nor was there a prescribed further thirty (30) day period to endeavour 'to reach consensus'. The only material requirement is that the rental had to be agreed.

[19] I shall assume in favour of the respondent, because I believe it to be the correct construction, that such agreement could be at any stage after the notice was received (it was dated 14 July 2008) and three (3) calendar months prior to the date of termination of the lease ie 31 December 2008. Inevitably agreement presupposes an offer and then an acceptance corresponding to the terms of the offer, and to that extent would entail negotiation. But does an alleged 'right' to renew, if it in fact is a right properly construed, impose a positive obligation or duty on the party who rejected the offer (or who might fail to accept the offer made within a reasonable time, at worst by the latest 31 December 2008) to make a counter offer for consideration by the respondent? In my view, clause 3 and the 'right' contained therein did not go that far.

[20] On that interpretation, once no agreement had been reached at least three (3) calendar months prior to the date of termination of the lease, there was no agreement, cadit quaestio.

[21] The terms in which the 'right' was conferred, did not carry the corollary of a duty in terms so wide that it required extensive offers and counter offers being exchanged, or even as little as a positive duty to actually respond to the respondent's proposed offer of rental. Simply not responding to the offer or indicating that it was not being considered (even if for misguided reasons), would result in no agreement being reached on the rental as required by the clause, and hence the alleged 'right' becoming null and void. The Shoprite case is in my view clearly distinguishable.

[22] However, even if I was wrong in that regard and the "right" conveyed some obligation to engage in a process of negotiation for a non-specified period of time (probably not later than 31 December 2008), the legal requirement that such negotiation would have to be in good faith, without any reference to a readily ascertainable objective standard according to which good faith could be assessed, would render the clause simply too vague to give rise to enforceable obligations.

[23] If the 'right' carried the corollary of negotiating, then our law would require that it be in good faith – see Southernport Developments (Pty) Ltd v Transnet Ltd (supra) at para [15] and [16] at page 211 where Ponnan AJA stated that the principles in the Australian Law as contained in Coal Cliff Collieries (Pty) Ltd v Sijehama (Pty) Ltd (1991) 24 NSWLR 1 accorded with South African Law.

[24] As was held however, 'certainty, it would appear, is the touchstone of enforceability of agreements to negotiate in good faith in Australia'. It is correct that some of the comments made in that context in the Southernport Developments judgment might be obiter, as suggested by Mr Ploos van Amstel SC on behalf of the respondent, but they nevertheless contain considerable persuasive value and state the legal position as I believe it to be.

[25] In Coal Cliff Collieries (Pty) Ltd v Sijehama (Pty) Ltd (supra) Kirby P distinguished three situations, namely:

(a) that where an identified third party has been given the power to settle ambiguities and uncertainties in an agreement;

(b) those instances where a promise to negotiate in good faith will occur in the context of an arrangement which by its nature purpose, contents other provisions or otherwise makes it clear that the promise is too illusory or too vague and uncertain to be enforceable; and

(c) a category, (referred to in the judgment as the second category) where with reference to 'a readily ascertainable external standard' the court may be able to add flesh to a provisions which is otherwise unacceptably vague or uncertain or apparently illusory.

[26] Given that in our law a lease at a reasonable rental is unenforceable, the certainty sought to be gleaned with reference to 'a readily ascertainable external standard' would be lacking.

[27] If a counter offer from the applicant was required, it could never be judged as to whether it was made in good faith or not, in the absence of a readily ascertainable external standard being specified.

[28] A further complicating factor in the present case is that the applicant's stated intention was to refurbish and upgrade its property. The amount it would require for rental, if it was to be precluded from renovating during the renewable period, might therefore be considerably different to an otherwise market related rental for the property. There would be no purpose to require a counter offer to be made to give effect to the duty of negotiating in good faith

where the decision as to the bona fides of that offer would be dependent on grounds too vague to give rise to certainty.

[29] The clause in the present matter falls into the final category identified by Kirby P of being a promise, assuming it to be one to negotiate in good faith, which by its very nature, purpose and context is simply too vague and uncertain to be enforceable.

[30] In Brink v Premier, Free State, & Another 2009 (4) SA 420 (SCA) the court a quo had concluded that the respondents faced with a notice of renewal of a lease 'on the same and/or new conditions as would be mutually agreed' held that the respondents were not entitled to refuse to negotiate. At first that judgment might appear to support the respondent's argument. The matter is, however, distinguishable on the facts. It is furthermore significant that although Ponnan JA dismissed the appeal, he specifically stated at paragraph [14] that "There being no counter appeal, it is unnecessary to consider whether the order of the court below is a competent one'.

[31] The respondent failed to set out a basis in law defeating the applicant's claim. I accordingly granted an order evicting the respondent from the property known as Postal 25 Hinton Place, Virginia Shopping Centre, Durban North and directed the respondent to pay the costs of the application.

Date of Hearing	:	25 May 2010
Date of Judgment	:	25 May 2010
Counsel for Applicant	:	J-H Roux SC
Instructed by	:	Werksman Inc.
Counsel for Respondent	:	van der Merwe du Toit Inc.